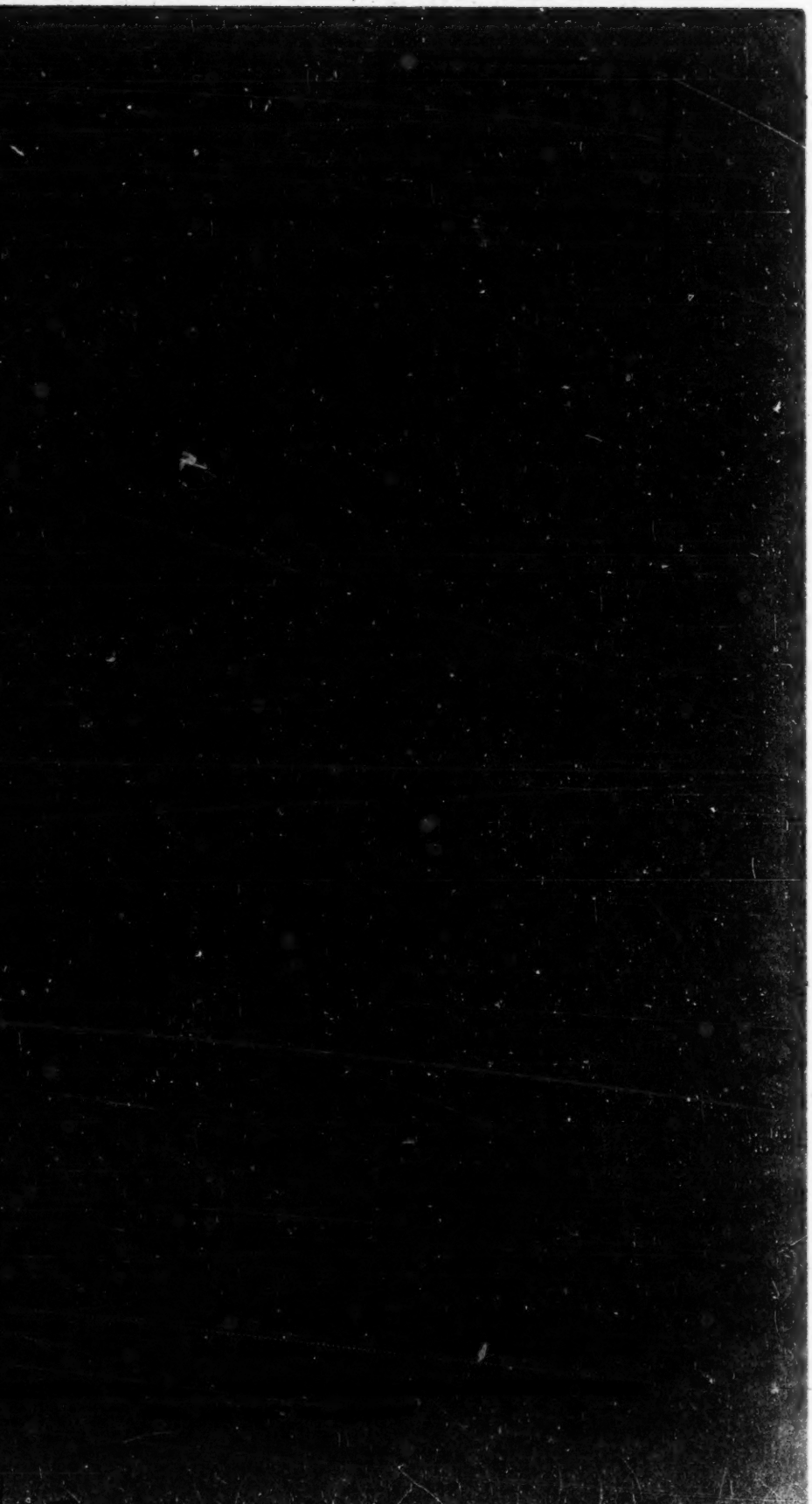

SUBJECT INDEX

LIST OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM 1950

No. 252

AMERICAN FIRE AND CASUALTY COMPANY, *Petitioner*,

v.

FLORENCE C. FINN, *Respondent*

BRIEF FOR PETITIONER

Opinion Below

The opinion of the Court of Appeals for the Fifth Circuit is reported in 181 Fed. (2), 845.

Jurisdiction

The judgment of the Court of Appeals was entered on May 25, 1950 (R. 194). Petition for rehearing was denied on June 16, 1950 (R. 207). The petition for writ of certiorari was filed on August 16, 1950 and was granted October 16, 1950 (R. 207). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether a complaint which in substance states alternative theories of recovery, each asking for joint and several relief by a citizen of the state in which suit is commenced against a citizen of the same state and two corporate citizens of other states, is removable from a State Court to the United States District Court under the provisions of 28 U.S.C. 1441, Act June 25, 1948, C. 646, Sec. 39, 62 Stat. 992, eff. September 1, 1948.

Statutes Involved

The pertinent statute cited immediately above is quoted:

"Section 1441. Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State Court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a *separate and independent claim or cause of action*, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues

therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction" (Emphasis ours).

The statute formerly in effect governing the removal of causes of the type presented by the instant case was Title 28 U.S.C.A. 71, Sec. 28, 1911 Judicial Code, 36 Stat. 1101. For comparative purposes the pertinent provision of that statute is quoted:

"* * * * And when in any suit mentioned in this section there shall be a *controversy* which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district * * * " (Emphasis ours).

Statement

This case was originally filed in the State District Court of Harris County, Texas, naming as Defendants Petitioner, a corporate citizen of Florida, the Indiana Lumbermens Mutual Insurance Company, a corporate citizen of Indiana, and Joe Reiss, an individual and citizen of the State of Texas (R. 3). There is only one event alleged to have occurred that brought about the damages of which respondent complains. That is, the destruction of her house by fire on May 6, 1948 (R. 6). The first four paragraphs of the petition filed state an action against Petitioner on the basis of its breach of an insurance contract in full force and effect in favor of Respondent. In the allegations therein made, Respondent accuses Petitioner's agent, Joe Reiss, also a Defendant in the action as originally brought, of being guilty of certain

wrongful acts, in failing to deliver to Respondent the insurance policy and in changing the terms of the policy at a date subsequent to the fire (R. 6-8).

In the alternative, Respondent then says in paragraph five of her petition that she had an enforcible contract of insurance with the Indiana Lumberman's Mutual Insurance Company and, further, that if it appeared that such contract was not valid and enforcible at the time of the fire, Joe Reiss, as agent of the Indiana Lumbermens Mutual Insurance Company, agreed to keep her property insured at all times against loss by fire and agreed to notify Respondent of the expiration or cancellation of such policy, but that Reiss never informed Respondent of such expiration or cancellation if it appeared that such had been effected (R. 8-9). And then appears a signature line for Respondent's counsel (R.9).

Beginning immediately after this signature line, in form of alternative plea, Respondent embellishes the allegations of wrongful acts heretofore made against agent Reiss and says that during all material times Reiss was acting within the course and scope of his employment for both petitioner and the Indiana Lumbermens Mutual Insurance Company. The tenor of the claim made is summed up by the following language from the petition:

> " * * * That such acts and conduct on the part of said Joe Reiss as agent for the said two insurance companies, renders said Joe Reiss, agent, the Joe Reiss Insurance Agency and the American Fire and Casualty Insurance Company of Orlando, Florida, and the Indiana Lumbermens Mutual Insurance Company of Indianapolis, Indiana, *jointly* and severally liable for the full amount of the damages that plaintiff has suffered by reason of

said fire in the amount of Five Thousand Dollars" (Emphasis ours) (R. 11).

Then follows the general prayer for relief. And it is here quoted verbatim so that the exact nature of the relief requested can be determined:

> " * * * Wherefore, plaintiff prays the Court that the defendant Joe Reiss, agent for said two insurance agencies and said two Insurance Companies be cited to appear and answer this petition, and upon a final trial of this cause that she be given a judgment against the American Fire and Casualty Insurance Company, the Indiana Lumbermens Mutual Insurance Company and Joe Reiss, *jointly* and severally for the full amount of Five Thousand Dollars with interest from the 7th day of May, 1948, at the rate of six per cent per annum, together with the costs of this suit; and that she have such other and further relief, general and special in law and equity as she is entitled" (Emphasis ours) (R. 11).

Within the time provided by law, Petitioner removed the case to the District Court of the United States, Southern District of Texas, Houston Division (R. 3-5). Respondent moved to remand to the state court, but such motion was denied (R. 23). At a subsequent date the case was tried before a jury upon whose verdict a judgment in favor of Respondent against only Petitioner was entered. This judgment relieved the other Defendants from responsibility to Respondent (R. 175). Petitioner then moved to vacate the judgment previously entered and moved for the case to be remanded to the State Court from which it was removed. The essence of this motion was that the recent decision of the Court of Appeals, Fifth Circuit, BENTLEY v. HALLIBURTON OILWELL CEMENTING COMPANY, 174 Fed. (2d)

788, which opinion was published after the rendition of judgment in the case at bar, construed Art. 1441(c) of the Judicial Code in such a manner as to withdraw removal jurisdiction in the instant case. This motion was denied (R. 181) and appeal was perfected to the Court of Appeals, Fifth Circuit, where the judgment entered by the trial court was affirmed (R. 194).

Specification of Errors

The Court of Appeals, Fifth Circuit, erred by holding that a District Court of the United States has removal jurisdiction of a complaint where claim is made by a resident Plaintiff against resident and non-resident Defendants asking joint and several relief and it not appearing that a "separate and independent claim or cause of action" is stated against the resident and non-resident Defendants.

Summary of Argument

The new removal statute, effective September 1, 1948, has brought about a radical limitation of the removal jurisdiction of the Federal Courts from what it formerly was. The stated purpose of the Revisers of the Judicial Code and of the Legislative Committees preparing such code for submission to Congress is to effect this result. "Separate and independent cause of action" denotes an entirely different concept than "separable controversy." Insofar as comparison between the terms is necessary, controversy under the old statute meant simply adversary disputes within one cause of action. "Cause of action" means, insofar as applicable to the 1948 removal statute, the operative facts bringing about one legal injury by the violation of one legal right by a single legal wrong. In other words, as long as the relief prayed

for by the Plaintiff asks for only one recovery from one set of facts bringing about only one injury, there is only one cause of action. It makes no difference that the Plaintiff proceeds in the alternative against the several parties Defendant, or that he sets forth several legal theories of recovery such as breach of contract and tort. The singleness of the economic injury is the controlling tests.

If remedial theories are to be applied, the law has degenerated to the old forms of action or writs which have long been abolished in both Texas and the federal system.

When the substance of Plaintiff's entire petition is considered, it will be seen that a breach of contract and tort action is stated jointly and severally against petitioner and its local agent, Joe Reiss, and in the alternative against the Indiana Lumbermens Mutual Insurance Company and its local agent, Joe Reiss.

The Court of Appeals, Fifth Circuit, held that plaintiff's complaint stated three separate and independent causes of action, two of which were breach of contract actions against the two insurance companies and the third was an action evidently in tort against Joe Reiss, the local agent, and the two insurance companies in which joint and several relief was asked. Yet, the Court below recognized that "all three claims are with reference to the total destruction by fire of a single house owned by appellee," and further recognized that the action against the resident agent was a claim for "the same loss."

Whether Plaintiff's petition is construed as Petitioner seeks to construe it, or whether it is construed in accordance with the view of the court below is immaterial in reaching a proper decision in the case at bar.

Even if this Court agrees with the construction of the

complaint given by the Court of Appeals, Fifth Circuit, the case is not removable because of the singleness of economic injury resulting from the commission of one violation of one legal right presented by one set of operative facts.

Argument

Propriety of removal from State to Federal Court presents question of substantive Federal jurisdiction and even though not complained of by any party to the proceeding, may be raised by the Court from the record. In fact, jurisdiction has been held to be the first and fundamental question to be inquired into when the record comes before the Court. MANSFIELD v. SWAN, 111 U.S. 379.

Federal jurisdiction can never be gained by estoppel, nor can it be waived, because a defect in jurisdiction is not modal but of substance. Therefore, Petitioner's action in participating in the removal of the instant case from the state court to the District Court, Southern District of Texas, Houston Division, defending such proceeding against subsequent attack by Respondent, and then later complaining of the lack of jurisdiction of such court is immaterial. The foregoing statement is supported by several case decisions, among them being TILLMAN v. RUSSO ASIATIC BANK, 51 Fed. (2d) 1023 (Second Circuit, 1931) where the court held:

> "As a further ground for retaining both causes of action, the plaintiff says that it does not lie in the mouth of the defendant, who removed the suit, to object to jurisdiction. But jurisdiction cannot be conferred by consent, and where the case which has been removed was one over which a federal court could never have had jurisdiction, it must be remanded, and the suggestion for remand may come from the removing party * * *."

To the same effect is the decision in WABASH RAILROAD COMPANY v. BARBOUR, 73 F. 513 (Sixth Circuit, 1896). Here former Chief Justice Taft, while a Circuit Judge, stated:

> "* * * Nor is it material that the removal was caused by the party now complaining of it. It is well settled, by decisions of the Supreme Court, and on principle, that the party improperly removing the case from the state court may assign as error the want of jurisdiction over the subject-matter of the court to which the removal has been had. Martin's Adm'r v. Railroad Co., 151 U.S. 674-690, 14 Sup. Ct. 633; Railway Co. v. Swan, 111 U.S. 379-382, 4 Sup. Ct. 510; Capron v. Van Noorden, 2 Cranch, 126; Brown v. Keene, 8 Pet. 112. The defect in jurisdiction here is not merely modal, like the time within which a petition for removal is to be filed, but it goes to the substance of the jurisdiction."

Having determined that there is no legal impediment to Petitioner's attacking the removal jurisdiction, a discussion of the present removal statute will be given. In the instant case a citizen of the state of Texas has filed suit against Petitioner, a corporate citizen of Florida, the Indiana Lumbermens Mutual Insurance Company, a corporate citizen of Indiana, and Joe Reiss, individual and citizen of Texas. Therefore, in order to be removable, it must satisfy the requirements of Sec. 1441(c) of the Judicial Code of 1948. The provisions of that section are repeated as follows:

> "(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues

> therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

The enactment of this statute repeals Sec. 28 of the 1911 Judicial Code, 36 Stat. 1101 which provided in part as follows:

> " * * * And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district * * * ."

Removal jurisdiction of the Federal Courts has not remained constant throughout the judicial history of our country. From the judicial act of 1789 until 1866 complete diversity of citizenship was required. That is, no distinction such as "separable controversy" or "separate and independent claim or cause of action" was attempted so as to enlarge the class and number of cases which could be tried in the Federal system. In 1866, with a view of helping correct the local prejudices which tore our nation at that point in history, Congress provided for the removal of "separable controversies" all of which were within one suit. That is, the Plaintiff and one of the Defendants could be citizens of the same state if there was joined a Defendant who was a citizen of another state and a "separable controversy" existed between the parties. The whole case could be removed then to the Federal Court, 14 Stat. 306 (1866). This enlargement of removal jurisdiction was continued through a number of subsequent acts resulting in the above quoted provision of the Judicial Code of 1911 which was in effect until September 1, 1948.

It was the specific purpose of the Revisers of the Judicial Code to swing back to a more restricted removal jurisdiction by the enactment of Sec. 1441(c) of the 1948 Code. This intention was manifested by the report from the committee of the Judiciary House of Representatives to accompany H.R. 3214 which provided in part as follows:

> "Sec. (c) permits the removal of a separate cause of action but not of a separable controversy unless it constitutes a separate and independent claim or cause of action within the original jurisdiction of the United States Courts. In this respect, it will somewhat decrease the volume of Federal litigation."

Professor J. W. Moore, appearing before sub-committee No. 1 of the Judiciary House of Representatives, Eightieth Congress, First Session, as a special consultant, testified as follows:

> " * * * I believe considerable improvement has been made by section 1441(c) relative to the removal of separable controversies and separate units—a matter which is in great confusion at the present time."

Since the enactment of the 1948 Judicial Code, Professor Moore has published MOORE'S COMMENTARY ON THE JUDICIAL CODE, on page 239 of which he describes the thinking of the Revisers on this particular question. His expressive language is as follows:

> "The Revisers had two reasons for eliminating the separable controversy as a basis for removal. First, this ground for removal had been added following the Civil War in an effort to protect a non-resident defendant, who had been joined with one or more local defendants under the relaxed and expanding state joinder pro-

> visions. Second, the confusion surrounding the concept of separability overshadowed whatever present utility it had. On the other hand not all of the Revisers were willing to confine removal to two general grounds; the federal question, and complete diversity. They did, however, desire a substitute that would restrict more narrowly the right to remove. Accordingly, they eliminated the separable controversy, which involves the joinder of multiple parties interested in *one* cause of action; and confined removal to the situation where there is a joinder of two or more causes of action * * *."

By enacting Sec. 1441(c) of the Judicial Code into law, against this backdrop of stated Congressional intent, a new concept of removal jurisdiction has been installed. Since September 1, 1948, in order for a suit to be removed under Sec. 1441(c) not only must there exist a dispute or controversy between parties of diverse citizenship, but that controversy must constitute a complete claim or cause of action which is not merely separable from other claims or causes of action stated against a resident Defendant but one which is *separate* and *independent* of them. No longer will a simple dispute or controversy between persons of diverse citizenship in one suit support removal.

If the change in wording from the old statute to the new is to have its full intended results, the substitution of the phrase "cause of action" for "controversy" must be given broad effect. Professor Moore observes, op. cit. supra, 238:

> "So that the old separable controversy wine will not be served under the new label, Courts must give a broad meaning to cause of action * * *."

The term "cause of action" is used in various senses and is descriptive of many situations in the law. It is not a term of exact meaning, and the dilemma approaching one who

seeks a definition of the phrase as applied to a given situation is forcibly pointed out in the decision of this Court in UNITED STATES v. MEMPHIS COTTON OIL COMPANY, 228 U.S. 62, where it was stated:

> " * * * A 'cause of action' may mean one thing when the question is whether it is good upon demurrer, and something different when there is a question of the amendment of a pleading or of the application of the principle of res judicata. * * * At times and in certain contexts, *it is identified with the infringement of a right or the violation of a duty.* At other times and in other contexts, it is a concept of the law of remedies, the identity of the cause being then dependent on that of the form of action or the writ. Another aspect reveals it as something separate from writs and remedies, *the group of operative facts out of which a grievance has developed* * * * " (Emphasis ours).

The Court then observes that it is not committed to any single definition of the phrase "cause of action" that will be dogmatically applied without regard to the relationships to be governed.

It chooses, however, the "operative facts" definition to apply where the contention is made that limitations barred the filing of an amended claim for tax overpayment. The specific holding made is that the amendment of a general claim for overpayment, setting up with particularity the exact items claimed, does not state a new cause of action so as to bar the amendment by a statute of limitation.

Professor Moore, op. cit. supra, at 238 applies this definition of cause of action to Sec. 1441(c) when he says:

> " * * * where a group of operative facts give rise to a claim on the part of the plaintiff, as where several persons contribute to his injury and he sues one or more

of them in one action, the plaintiff is proceeding on one cause of action, and it is not removable under Art. 1441(c). * * * "

This clearly indicates that removal is proper only when one or more Plaintiffs complain of separate injuries independent of each other. If the Plaintiff has suffered only a single injury, the fact that he has separate remedies against several Defendants is immaterial.

This viewpoint is pointed up by a decision of this Court in BALTIMORE STEAMSHIP COMPANY v. PHILLIPS, 274 U.S. 316 (1927). Here emphasis is placed upon the unitary nature of the injury, the demand for damages, the legal wrong committed, or the legal right violated. The multiplicity of the facts constituting the set of "operative facts" is of no importance. The Court's language is as follows:

> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, *is the violation of but one right by a single legal wrong.* The mere multiplication of grounds of negligence alleged as causing *the same injury does not result in multiplying the causes of action.* 'The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. "The thing, therefore, which in contemplating of law as its cause, becomes a ground for action, is not the group of facts alleged in the declaration bill, or indictment, but the result of these in a legal wrong, the existence of which, if true, they conclusively evince." ' Chobanian v. Washburn Wire Co. 33 R.I. 289, 302, 80 Atl. 394. Ann. Cas. 1913D, 730." (Emphasis our).

In giving definition, the Court was presented with a suit where a seaman lost his leg in a shipboard accident. He first filed a libel in Admirality on the basis that defective appliances were in use at the time of his injury and he recovered an indemnity. Subsequently, he brought a Common Law action for personal injuries against the steamship company and others alleging negligent operation of various appliances by the officers and agents of the company. The Court below overruled the steamship company's plea of res judicata on the theory that the Common Law damage suit presented a different cause of action from the Admiralty suit. This Court, however, summarily reversed this holding with the following expressive language:

> "Upon principle, it is perfectly plain that the respondent suffered but *one actionable wrong and was entitled to but one recovery*, whether his injury was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. *In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff*, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex." (Emphasis ours.)

The rationale of the above holding coincides precisely with petitioner's construction of the phrase "cause of action" as used in our present removal statute. In the instant case, the single primary right invaded by the one legal wrong which is either joint or several is the right of Plaintiff to collect insurance proceeds for the destruction of her house by fire. The injury claimed will be compensated by the payment of one sum of Five Thousand Dollars ($5,000.00) coming from either one, all, or any two of the Defendants. A separate sum against each Defendant is not prayed for. Clearly only one cause of action is asserted.

Other than the case at bar there have been only two Appellate Court decisions construing the language of Article 1441(c). These are *Bentley v. Halliburton Oilwell Cementing Company*, 174 Fed. (2) 788 (Court of Appeals, Fifth Circuit) and *Mayflower Industries v. Thor Corporation and Teldisco Incorporated* (Unreported, No. 10,205, Court of Appeals, Third Circuit, Opinion filed August 8, 1950). Both of these decisions held that a change has been effected in removal jurisdiction by the enactment of the new Code. Petitioner has no quarrel with the results reached by either of these Courts in the cases mentioned. However, it is submitted that the reasoning employed by the Court of Appeals, Fifth Circuit, in the Bentley case led to the erroneous result that it reached in the instant case. It is believed that the only reason the Court reached a holding of non-removability in the BENTLEY case was because it was dealing with a fact situation that would not even have been removable under the old statute.

While the Court did hold that separable controversies as a ground of removal jurisdiction had been abolished by the enactment of Sec. 1441(c), and reasoned that a plurality of negligent acts would not establish more than one cause of action so long as there was a violation of only one right by a single wrong, it fell into erroneous thinking when it said:

> "The separable controversy was uprooted but the soil in which it flourished remains. The difference between the two concepts is one of degree and not of kind, and the basic principles are as applicable now as they were under prior statutes."

Clearly, it was the intent of Congress to completely abolish every vestige of "separable controversy" as a ground for removal. This intent is shown by the change in the lang-

uage itself and when this change in language is fortified by the stated intent of Congressional Committees, Revisers of the Code, and of the expert consultants, it is an unalterable certainty.

How much more practical approach was taken by the Court in the case of *Butler Manufacturing Company v. Wallace & Tiernan Sales Corporation*, 82 Fed. Supp. 635 (W.D., Missouri, 1949) where the Court stated:

> "* * * No longer are the courts to be confronted with the perplexing problem of determining the 'separate' or 'separable' nature of 'controversies' as under former removal statutes. The destinctions which have heretofore been made in the case law between separate and 'separable controversies' and which were held to authorize the right of removal are now to be cast into the limbo of rejected and repealed law."

The perplexing nature of "separable controversy" was the evil aimed at in changing the Code. Just as does a good gardener, Congress dug up and changed the soil, not only did it move the offensive roots.

Further, the Court below, in writing its opinion, cited as authority its own decision of *Texas Employers Insurance v. Felt*, 150 Fed (2) 227, a case in which it was construing Sec. 28 of the 1911 Code. No brighter examples of the exact fact situation that Congress meant to make non-removable by the enactment of the new code, but which would have been removable under the old code, exist than that of the Felt case and the case at bar. The Fifth Circuit, in the Felt case, even recognizes this fact because in a situation exactly parallel to that which exists in the instant case, it held that only one cause of action was presented, yet there appeared three controversies.

There the Plaintiff was in a dilemma as to which of three workmen's compensation companies actually owed the sum sued for. Therefore, Plaintiff sued all three of them in the alternative and concluded with a general prayer for joint and several relief. Two of the companies were corporate citizens of states other than Texas and one was a corporate citizen of Texas. The case was originally filed in State Court and subsequently removed, after which judgment was rendered against only the corporate citizen of Texas. The contention was made that the Court did not have jurisdiction. The Court's own language stating that only one cause of action existed is as follows:

> "*There was only one cause of action, one claim for compensation under the law and the facts,* but there were three separate controversies with the Defendants as to which of them was bound to pay the amount claimed." (Emphasis ours).

In the case at bar, respondent found herself in the dilemma of not knowing which of three parties owed her an indemnity for the destruction of her house. She sued all three of them in the alternative and concluded with a general prayer for joint and several relief. Just as in the Felt case, only one amount of money was sought to be recovered.

Because of his intimacy with the subject, both as a special consultant to the Revisers of the Judicial Code and as a famous authority on Federal procedure, Professor Moore is again cited as authority. On page 251 of *Moore's Commentary on the Judicial Code,* this language which dramatically points out Petitioner's position in the present case appears:

> "* * * *But where the plaintiff joins two or more defendants to recover damages for one injury, and even*

though he charges them with joint and several liability or only several liability, or charges them with liability in the alternative, there is no joinder of separate and independent causes of action within the meaning of Sec. 1441 (c). *At most a separable controversy is presented where several or alternative liability is alleged, and is no longer the basis for removal.*" (Emphasis ours).

A Court that did not serve the "separable controversy wine" under the label of "separate and independent cause of action" is the Court of Appeals, Third Circuit, in its decision in *Mayflower Industries v. Thor Corporation and Teldisco Incorporated* (Not reported, No. 10,205, Opinion filed August 8, 1950). In this case the facts were more indicative of the existence of a "separate and independent claim or cause of action" than in the instant case because the relief asked for by the Plaintiff against two Defendants was not completely coextensive as to territory. Here Mayflower, a New Jersey Corporation, had a contract with Thor, an Illinois corporation, by which Mayflower was appointed exclusive distributor of Thor products in New Jersey and one of two distributors in New York and Pennsylvania. This action was instituted in the state court of New Jersey against Thor and Teldisco, a New Jersey corporation, the action against Thor set up a breach of the distributorship contract as to all the territories included in such contract. Then in stating its action against Teldisco, Mayflower alleged that as to the New Jersey territory only, Teldisco had induced Thor to wrongfully cancel Mayflower's contract of distributorship and that Teldisco had taken over the New Jersey distributorship to Mayflower's disadvantage. Further, it was alleged that this action on Thor's and Teldisco's part "constitutes an unlawful, wanton, and malicious conspiracy on the part of both

Defendants to injure the plaintiff in its lawful business and to deprive the plaintiff of the fruits thereof." As well as injunctive relief, damages were asked to be assessed jointly and severally, but Teldisco was to respond in damages only to the extent that injury was inflicted in the New Jersey territory.

The two Judges constituting the majority of the Court wrote separate opinions. There was one dissent. Each of the majority opinions held that a radical change in removal jurisdiction had been effected by Sec. 1441(c) bringing about a considerable narrowing of the right to remove over such that formerly existed. Placing emphasis upon the addition of the word *independent* to the requisites of removability and on the singleness of economic injury, Judge Hastie holds as follows:

> " * * * 'Separate alone might connote no more than the separability of controversies for purposes of litigation. But that is not enough here. We believe the adjectives 'separate and independent' were used in conjunction to convey some meaning which would not have been apparent fom the use of one adjective alone. At least their common underlying connotation of absence of some significant connection is emphasized. * * * "
>
> " * * * From the point of view of the complainant, Mayflower, the termination of its distributorship and the substitution of Teldisco as sole New Jersey distributor of Thor's product immediately thereafter are at most but two aspects of a single economic injury. This is true whether or not Mayflower's conclusion with reference to a 'conspiracy' between Thor and Teldisco is deemed on its face a legally sufficient pleading of this basis of liability.
>
> It is even more significant that the circumstances and alleged illegality of the termination of Mayflower's distributorship by Thor constitute the principal con-

> troversial issue in the establishment of any cause of action by Mayflower against Teldisco. There is almost complete coincidence of the basic operative facts. Thus analyzed, the claims are not separate and independent."

Judge Goodrich in presenting a concurring opinion states that he in no way disagrees with the views given by Judge Hastie, but simply wants to express another point of view that may be helpful on the subject. His reasoning is that whenever a recovery against one of the Defendants for the full amount of the damages sustained would bar an action against the other Defendants, the unitary nature of the injury becomes obvious. Accordingly, only one cause of action exists. He, too, places decided emphasis on the addition of the word *independent* to the present Code. His language so eloquently presents Petitioner's argument to this Court it is quoted as follows:

> * * * The right which the plaintiff seeks so vindicate in this case is an economic one, his interest in the profitable relations between himself and Thor, as set out in the contract between them (the existence of the contract and its terms are assumed for the purpose of this discussion.) Two defendants have allegedly interfered with that profitable economic relation, just as in the *Bentley* case the two tortfeasors combined to invade the plaintiff's right to personal security. Thor violated its promise and Teldisco conspired with Thor to deprive the plaintiff of the value of the economic relationship then existing. It seems to me that the injury is one. Either defendant could be sued for having inflicted it, and if the elements of damage are the same as to both defendants, the satisfaction of a judgment against either would bar the plaintiff from further recovery. An analogous situation is found where a plaintiff pursues separately claims against one who breaks a contract and

against another who induced the violation of the contract. Satisfaction of one of these judgments apparently precludes further recovery by plaintiff. *Bird v. Randall*, 3 Burr. 1345, 97 Eng. Rep. 866 (K.B. 1762); Restatement, Judgments Sec. 95, Comment b.

It is true that under the plaintiff's allegations his claims against either defendant are 'separate' in the sense that a suit would lie against either one alone. That was also true in the *Bentley* case. An injured person may sue either tortfeasor. But while it may be conceded that the claims are separate, by a parity of reasoning with the *Bentley* case, it seems to me it is established that they are not independent. The controversy, therefore, was not properly removable and the case should be remanded to the New Jersey state court."

A textbook example of the type of case that presents a separate and independent claim or cause of action is *McFaddin v. Grace Line Incorporated*, 82 Fed. Supp. 494 (S.D.N.Y., 1948). Here a number of shippers joined in a single unit numerous claims of loss on wholly different shipments. Complete diversity of citizenship was lacking as to only one of the claims so joined, nevertheless the entire case was removed because not only were there separate causes of action stated but each was independent of the other.

Obviously, Congress had no intent to include within the meaning of "cause of action" the remedial concept of that term. If, by its use, it was intending such (such intent being wholly negated by the Congressional reports and Reviser's notes) it is nothing but a throwback to the archaic and outmoded practice of Common Law forms of action or writs. Surely this could not be the intent when Common Law forms of action have been abolished by the practice in the Federal system, and have not been used in

Texas since 1840 when they were banned by the Congress of the Republic of Texas. 1 *Tex. Jur.* 610. Further, just because a Plaintiff may have a legal theory of recovery "sounding in tort", and another "sounding in contract" is of no import. The singleness of injury, the singleness of right violated by a single wrong by one set of operative facts regardless of their number, is now the true test.

Reference is made to several trial court decisions construing Sec. 1441(c). In the case of *Robinson v. Missouri Pacific Transportation Company*, 85 Fed. Supp. 235 (W.D. Arkansas, 1949) it was held that employees suing their employer and several of the employer's executives under a labor agreement prohibiting their discharge except for cause, that the action was not removable because each Plaintiff was suing on a single cause of action against all Defendants.

The case of *Harwood v. General Motors Corporation*, 89 Fed. Supp. 170 (E.D.N.C. 1950) presented the familiar fact situation where the Plaintiff, a resident, sued the non-resident manufacturer of an automobile and the resident dealer, it was alleged that the manufacturer negligently placed a defective steering wheel upon the automobile and that the dealer was negligent in failing to discover the defect. The case was held not to be removable by the non-resident Defendant.

In *Billups v. American Surety Company*, 87 Fed. Supp. 898 (Kansas 1950) the Plaintiff, as a result of an automobile collision, sued the owners of both vehicles involved on the grounds that the accident resulted from the negligence of each Defendant and the Court held that such was not removable.

In *English v. Atlantic Coastline Railroad Company*, 80 Fed. Supp. 681 (Eastern E.D.S.C., 1948), and in *Bachman v. Seaboard Airline Railroad Company*, 80 Fed. Supp. 976

(E.D.S.C. 1948) and in *Thomas v. Thompson*, 80 Fed. Supp. 225 (E.D. Arkansas, 1948), the Plaintiff sued the non-resident railroad and joined the engineers of the respective locomotives who were residents of the same state as the Plaintiff alleging that the injuries inflicted were caused by the negligence of the engineers. In all of these cases it was held that no removal jurisdiction was present.

Still effectual are the case decisions of this Court that define the time and method of construction of the Plaintiff's petition in order to determine removability. *Powers v. Chesapeake and Ohio Railroad Company*, 169 U.S.; *Alabama Great Southern Railroad Company v. Thompson*, 200 U.S. 206; *Pullman Company, et al v. Jenkins, et al*, 305 U.S. 534; and *Louisville & N. R. Company v. Wangelin*, 132 U.S. 599 demonstrate that the cause of action for the purpose of removal is deemed to be that which the Plaintiff makes it. In other words, the Defendant cannot make several or separate that which the Plaintiff has chosen to make joint even if the Defendants filed separate answers and set up different defenses and allege that they are not jointly liable. The rule laid down by these cases that failure of Plaintiff to establish a joint cause of action does not make the case removable, is still sound and in force. In other words, the allegations of the complaint are the controlling feature. It is still the law that the requisites of removal are to be determined by the condition of the record in the state court at the time of the filing of petition for removal.

In light of these decisions, the contentions advanced by respondent in the courts below that judgment was taken against only Petitioner, a non-resident, and that some time after judgment respondent intended to dismiss the actions stated against Joe Reiss, the resident Defendant, become immaterial. No subsequent act of the parties, the jury, or

the Court, could give removal jurisdiction. Removal jurisdiction is determined from the condtion of the record at the time the removal petition is filed.

Respondent will probably contend, as she did below, that a dismissal was effected as to Joe Reiss, the resident Defendant. The record is entirely silent on such action and to demonstrate this fact, Petitioner had a supplemental record made consisting of the docket entries in the trial Court showing that no dismissal, as claimed by respondent, was ever effected (R.190). In fact, the record indicates to the contrary when it is noted that Respondent first took judgment against all Defendants, which judgment was set aside by the trial Court (R. 170).

Under Texas substantive law, respondent, upon proper proof, conceivably had a right of recovery jointly and severally against the named Defendants.

The decision in AETNA CASUALTY AND SURETY COMPANY ET AL., V. LOVE, ET AL., 121 S.W. (2d) 986 (Commission of Appeals adopted by Supreme Court, 1938) holds that an insurance company is responsible for the wrongful acts of its agent done in the course of employment.

The case of BURROUGHS *v.* BUNCH, 210 S.W. (2) 211 (Writ of Error refused 1948) holds that when an insurance agent or broker undertakes to procure insurance on the property of another and fails to do so he will become liable for damages resulting therefrom. To the same effect is the decision of the Supreme Court of Texas in DIAMOND *v.* DUNCAN, 107 Texas, 256, 172 S.W. 1100.

It was said in the decision in KIRKPATRICK *v.* SAN ANGELO NATIONAL BANK, *et al*, 148 S.W. 362 (Austin Court of Civil Appeals, 1912, no appeal) that:

> " * * * It has frequently been held that where a person is damaged or injured by reason of the default, want of care, or negligence of the agent of a third person, he may join the agent and his principal in one action to recover the damages occasioned by such negligence or want of care."

While it is not a Texas decision, the case of MANCHESTER v. GUARDIAN ASSURANCE COMPANY, 151 N.Y. 88, 45 N.E. 381 expressly sets forth the substantive law appliable. This case held that if an assured gave notice to the agent of the insurance company of a change in property ownership and such agent agreed to effect the necessary endorsement on the policy but failed to comply with such agreement and the property was subsequently destroyed by the peril insured against, the insurer is liable in an action to recover the resulting damages.

Respondent has chosen to make her action joint. She asks for relief for only a single injury. One set of operative facts control. That she asks for relief under two legal theories is completely immaterial in determining the plurality of the causes of action asserted. In this case there cannot be a "separate and independent claim or cause of action" between persons of diverse citizenship because the entire complaint asserts only a single cause of action.

Conclusion

For the reason stated, it is respectfully submitted that the judgment of the Court below should be reversed and that direction be given that the case be remanded to the State Court from which it was removed.

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